Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-465

JERSEY CENTRAL POWER & LIGHT CO.,

Cross-Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; LOCAL UNIONS 327, 749, 1289, 1298, 1303, 1309 AND 1314, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; OFFICE OF FEDERAL CONTRACT COMPLIANCE; GENERAL SERVICES ADMINISTRATION; NEW JERSEY DIVISION OF CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Statutes Cited

Civil Rights Act of 1964:

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Sec. 706(b), 42 U.S.C. § 2000e-5(b) 4

Sec. 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) 4

28 U.S.C.:

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Sec. 2101(c) 2

Other Authority Cited

R. Stern and E. Gressman, Supreme Court Practice: Sec. 6.44, pgs. 310-312 (4th ed., 1969) 3

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Statement

Jersey Central Power & Light Co. (hereafter "company") cross-petitions for a Writ of Certiorari to review that part of the judgment of the United States Court of

Appeals for the Third Circuit which remands the cause for an evidentiary hearing.

Opinions Below

The opinion of the Court of Appeals is reported at 508 F. 2d 687. The decision of the District Court, while officially unreported, appears at 8 Fair Employment Practice Cases 690.

Jurisdiction

The judgment of the Court of Appeals was entered January 30, 1975, and a petition for rehearing was denied March 4, 1975. At the request of the Equal Employment Opportunity Commission (EEOC), Mr. Justice Brennan ordered on May 27, 1975 an extension of time to and including August 1, 1975 in which to file a petition for a writ of certiorari. Under 28 U.S.C. § 2101(c) the 60-day extension which was granted for the filing of a moving petition is the maximum permitted under law. On August 1, 1975, the last day of the aforesaid extension, EEOC filed its petition and therein presented for review an issue quite different from those issues presented to the courts below. Simultaneously, the EEOC seeks to move forward in the District Court below for an evidentiary hearing in order to pursue an inquiry as to whether or not the company-wide seniority system herein was designed or adopted with an intent to discriminate, citing the Circuit's opinion below as the controlling law of the case in this regard. In light of this entire course of conduct and because of the extremely unusual circumstances herein, the company respectfully requests that its cross-petition be considered on the merits, though perhaps technically out of time. *Pierson* v. *Ray*,

386 U. S. 547, 551 (1967); also see E. Stern and E. Gressman, Supreme Court Practice, Section 6.44 at pgs. 310-312 (4th ed., 1969). In addition to the foregoing cited authority, other reasons for exercising jurisdiction are set forth in Point I of the Reasons for Granting the Writ, *infra*. Certainly, at the very least, this application should be treated as a conditional cross-petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals err by remanding the cause to permit evidence to be adduced by parties in the current litigation on the question of whether the company-wide seniority system was bona fide within the meaning of Section 703(h) of the Civil Rights Act of 1964, in light of its holding that the seniority system of the collective bargaining agreement had been incorporated by the EEOC in the conciliation agreement?

Statute Involved

The following sections of the Civil Rights Act of 1964 are involved and are set forth in relevant part.

Section 703(h), 42 U.S.C. § 2000e-2(h):

> "Notwithstanding any other provision of this Title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations,

provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

Section 706(b), 42 U.S.C. §2000e-5(b):

"If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1):

"If . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent named in the charge."

Statement of the Case

For a complete statement of the case, the company refers the Court to the EEOC petition and the company brief in opposition in No. 75-182. Briefly stated here, the company had been charged with unlawful employment practices particularly with respect to hiring. Following an EEOC determination of reasonable cause, the company, the unions and the EEOC executed in December, 1973 a conciliation agreement in resolution of those charges; it contained an EEOC waiver of the right to sue. Shortly thereafter the company was required to reduce its work force by substantial numbers, the anticipated effect of which would be a disparate impact upon minorities if the layoff was accomplished in accordance

with the company-wide seniority system of the collective bargaining agreement. Confronted by adverse claims from the EEOC and the unions, the company sought judicial guidance by way of declaratory judgment as to its rights and obligations in effecting that layoff, under the conciliation agreement, the collective bargaining agreement, and Title VII. The District Court held that to the extent the two agreements conflicted, the conciliation agreement must prevail and the layoff must be accomplished in such a fashion as to preserve at its conclusion the ratios of miniorities and females which existed within the work force just prior to the commencement of the layoff. The unions appealed. The Court of Appeals held that (1) the conciliation agreement was consistent, and not in conflict, with the collective bargaining agreement because it incorporated the company-wide seniority system, (2) a company-wide seniority system providing for layoffs by reverse order of seniority is not contrary to public policy and welfare, and (3) the only challenge available against the company-wide seniority system by any *aggrieved or proper party* would be an attack upon its bona fide character, i.e., evidence directed either to the neutrality of the system or to ascertain an intent or design to disguise discrimination. In its petition to this Court the EEOC urges review of the Court of Appeals' treatment of the Section 703(h) proviso which treatment insulates bona fide seniority systems from attack unless adopted with a design or intent to discriminate. The EEOC construes the decision below to mean that layoffs pursuant to a company-wide seniority system having a disparate impact upon minorities cannot be a violation of Title VII even though that system carries forward post-Act discriminatory practices—unless the system itself was intended or designed to disguise discrimination. In the view of the EEOC, the remand grants it the right to pro-

ceed to an evidentiary hearing on this latter point. If this reading of the remand is correct, it completely overlooks the estoppel implications of the conciliation agreement. On the remand question the court commented in footnote 54 as follows:

> "Our analysis would make it appropriate for *a* district court to have evidence presented in two stages . . . if it is established that the plant-wide seniority system is not bona fide, then at a second evidentiary stage *an aggrieved or proper party* seeking relief may adduce all evidence relevant to a Title VII proceeding, including but not limited to past discriminatory employment practices." 508 F2d 706-707 (Emphasis added.)

Thereafter, the EEOC served interrogatories on the company and the unions but it agreed not to press discovery pending a determination by the Solicitor General as to whether a petition for a writ of certiorari would be filed. (Appendix A.) After the petition was filed on August 1, 1975, the EEOC requested that discovery proceed pursuant to the remand. (Appendix B.)

In its petition the EEOC ascribes post-Act discrimination to the company and contends that because of it the seniority system cannot be bona fide. Thus, the company is now pressed on two fronts with issues it contends the EEOC is estopped from raising by virtue of the conciliation agreement and the EEOC waiver contained therein. In both instances, the key principles of estoppel and waiver are being completely ignored and rendered meaningless.

REASONS FOR GRANTING THE WRIT

POINT I

The surprising shift of position by the EEOC and the current status of matters necessitates the filing of this Cross-Petition in order to obtain substantial justice.

The decision of the court below treated extensively and disposed of all of the contentions of the EEOC that had been advanced in both the District Court and Circuit Court concerning the conflict between the collective bargaining agreement and the conciliation agreement. The court set forth clear language that the seniority system was incorporated in the conciliation agreement and because of that fact there could be no conflict or complaint about the disparate impact on minorities. One could not be sure that the EEOC would not press on with this point until its time for appeal had expired. Until and unless that particular position was abandoned by the EEOC, the theory of estoppel did not come into play. Thus, once the conflict theory was abandoned by the EEOC, which was not known to the company and did not take place until the filing of the EEOC's instant petition, the theory of estoppel and waiver was not as significant as it has now become. It is true that if one were to speculate that an appeal would not be taken on the issue of conflict, the litigation would then flow in accordance with the Circuit Court opinion at the District Court level where the argument of estoppel might become involved. However, there were two reactions to this possible eventuality; (1) that under all of the circumstances it was simply inconceivable that the EEOC would try to attack the very seniority system that it incorporated in its conciliation agreement,

and (2) that the Circuit Court was not referring in footnote 54 to the current litigants in the instant litigation, *per se,* but rather was setting forth its view, in this setting of a declaratory judgment proceeding, declaring the rights and obligations of the parties, particularly the company and the unions, if there were a Title VII proceeding instituted by an individual not bound by the conciliation agreement. This latter explanation would explain the use of the language of the court in footnote 54 when it speaks of *a* district court and an *aggrieved or proper party.* When the Circuit Court speaks of the District Court below, it refers to it as it did in the closing paragraph of its opinion by the reference *the* District Court. Because of the nature of Title VII rights and the concern of this Court and the Circuit Court as well, as expressed in the *Alexander* v. *Gardner-Denver* decision, 415 U. S. 36 (1974), i.e., the rights of an individual under Title VII, the statements of the court below may be viewed in that context. In either case the need for a petition for certiorari on this point seemed highly unlikely. However, subsequent events have proved otherwise.

In sum, the abandonment of the conflict argument by the EEOC and its effort in the Supreme Court to establish post-Act discrimination, with the simultaneous effort in the District Court, both of which efforts must of necessity go behind the conciliation agreement, force the theory of estoppel to come center stage. It must be disposed of in order to conclude this proceeding as a matter of law.

Significantly, the time sequence and actions taken in these events were in the sole control and cognizance of the EEOC. The surprising shift of position by the EEOC and the current status of matters necessitates the filing of this cross-petition at this time in order to obtain substantial justice.

POINT II

The court below erred by remanding matters covered in the conciliation agreement for an evidentiary hearing.

Both policy and practicalities dictate a central role for the conciliation process. Congress has mandated and the courts require that the EEOC attempt to resolve charges of unlawful discrimination by conciliation before it can bring suit.[1] As a practical matter, the benefits of the Act would be largely lost if the conciliation process were perceived as an imperfect remedy. The Court may take judicial notice that the EEOC, employers and unions routinely enter into conciliation agreements in resolution of charges affecting millions of employees. It might be of little moment if an individual employee whose charge had been settled attempted to circumvent the settlement agreement. But here we have the EEOC, itself, attempting to go behind an agreement which it executed, and revive issues which have been resolved and which it agreed not to prosecute. The legal principle involved is so elementary and its significance to the successful administration of this Act so obvious that this attempt to prejudice the process by the very agency charged with its administration is nothing short of startling. The company opposes the EEOC petition because the EEOC presents an issue which distorts the record and relies on matters already resolved.[2] Not inconsistently, the company urges review of that portion of the decision remanding for possible

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[1] *EEOC* v. *Westvaco Corp.,* 372 F. Supp. 985 (D. C. Md. 1974); *EEOC* v. *Hickey-Mitchell Co.,* 507 F. 2d 944 (8th Cir. 1974).

[2] See the company's brief in opposition, Points B and C.

examination the seniority system's bona fide character—an opportunity which the EEOC has seized upon and is now pursuing. The company's position is quite simply that the EEOC is estopped from raising the question of the seniority system's bona fide character.[3]

The court below held that the seniority system had been incorporated in the conciliation agreement. Having so held, the court would commit error by then permitting the EEOC to challenge the system's bona fide character. The EEOC cannot now attack the very seniority system which it investigated, it later approved, it incorporated into its conciliation agreement and relied on as one aspect of the overall remedy for the charges which were settled. Because the seniority system is part of the conciliation agreement and since the EEOC has waived its right to sue with respect to all matters contained in that agreement, it would be inconsistent for the court below to open up to the EEOC the question of the bona fides of the seniority system. Now the company, the unions and the EEOC are confronted with needless hearings at substantial expense and time, plus the unwarranted raising of false hopes in laid off employees. Of extreme importance in this matter is the fact that an ancient rule, of great utility in the enforcement of this Act, is being disregarded to the detriment of the conciliation process.

A further compounding of such error below is the fact that a hearing has been directed on an issue for which the answer is self-evident. A company-wide seniority system, such as is involved here, is the purest form of seniority. For whatever purpose it is applied, be it transfer,

[3] Likewise, it is estopped from relitigating any of the matters contemplated by the Court of Appeals in what it describes as a second evidentiary hearing.

promotion, layoff, or recall, it measures every employee by a single standard and is completely impartial in its treatment. The Court of Appeals concluded that it was pointless to examine the effects of such a system and limited the inquiry to the question of intent. To this extent, such an inquiry is meaningless here because a neutral company-wide seniority system does not respond to intent. If there is (a) an intent to discriminate, (b) no intent to discriminate or (c) an intent not to discriminate, operationally the effects of such a system will be precisely the same, i.e., the measuring stick of time is the determining factor. Moreover, the fact is that a facially neutral company-wide seniority system can be nothing but bona fide. Stated differently, a facially neutral company-wide seniority system is *per se* bona fide. The proviso in Section 703(h) is undoubtedly intended for lesser kinds of seniority systems, such as departmental or job, or any form of gerrymandered or manipulated seniority which has the capacity and can be intended to discriminate.

CONCLUSION

Review should be granted of the lower court's remand since that portion of the judgment is inconsistent with the remainder of the majority opinion and operates to override the fundamental principles of estoppel and waiver.

Respectfully submitted,

APRUZZESE & MCDERMOTT
A Professional Corporation
Attorneys for Cross-Petitioner
VINCENT J. APRUZZESE
A Member of the Firm

[APPENDICES FOLLOW]

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D. C. 20506

June 13, 1975

Honorable Vincent P. Biunno
United States District Court Judge
United States District Court
District of New Jersey
Post Office Building, Room 411
Federal Court House
Newark, New Jersey 07101

CERTIFIED No. 955732 (Air Mail, Special Delivery)
RETURN RECEIPT REQUESTED

Re: *Jersey Central Power & Light Co.* v. *Local Union 327, I.B.E.W., et al.,* Civil Action No. 74-1083

Dear Judge Biunno:

We have this week received copies of letters to the Court from Jersey Central and from the union defendants, addressing both the Court's jurisdiction in the above-entitled matter and the proper timing for discovery. In our opinion this Court has jurisdiction, the Court of Appeals' mandate having issued and no party having sought a stay thereof. However, we would have no objection to holding discovery in abeyance until the Solicitor General's decision on petitioning for *certiorari,* and to considering the question again at that time.

Respectfully submitted,

JEFFREY H. ORLEANS
Attorney
Legal Counsel Division
Office of General Counsel

cc: Counsel of Record

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D. C. 20506

August 4, 1975

Honorable Vincent P. Biunno
United States District Judge
Post Office Building, Room 411
Federal Court House
Newark, New Jersey 07101

Re: *Jersey Central Power & Light Co.* v. *Local Union 327, IBEW, et al.,* Civ. Action No. 74-1083

Dear Judge Biunno:

On August 1, 1975, the Commission filed a petition for a writ of certiorari in the Supreme Court of the United States. A copy of that petition is enclosed.

In light of the petition we have filed we see no reason for any further delay in conducting discovery. The issues which remain for this Court, following the Third Circuit's remand, are unaffected by the question presented to the Supreme Court. We perceive the issues before this Court to be:

1. Whether the layoff system embodied in the collective bargaining agreement was either designed or intended to disguise discrimination.

2. Whether the layoffs—especially of bargaining unit employees—were necessary at all or whether Jersey Central had a feasible alternative to such layoffs. *See* the Commission's answer to the complaint, dated October 2, 1974.

Appendix B

These issues, we believe, will remain for determination no matter what the Supreme Court's action on our petition. Accordingly, discovery should now be permitted to proceed, pursuant to the Federal Rules of Civil Procedure.

Very truly yours,

LUTZ ALEXANDER PRAGER
Attorney
Office of the General Counsel

Enclosure

cc: all counsel of record
(without enclosure)